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January 16, 2015

VIA EFILE

Mr. Gary Shinnners
Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570-0001

Re: Capstone Logistics LLC and IBT Local 863
Case No. 22-RC-137642

Dear Mr. Shinnners:

Please be advised that we represent Capstone Logistics LLC (hereinafter the "Employer") in the above-referenced matter. Pursuant to Section 102.69(c)(2) of the National Labor Relations Board's Rules and Regulations Series 8, as amended, please accept this letter as the Employer's answering brief, opposing IBT Local 863's (hereinafter the "Union" or the "Petitioner") exceptions to the Regional Director's Report on Objection. Pursuant to Section 102.69(g)(3), we attach our position statement to the Regional Director for the Board's consideration.

The facts of this case are accurately set forth in Petitioner's Statement of the Case. The Petitioner argues that the Regional Director's decision is in error and that its election objection, that the Board Agent abused his discretion by not inquiring about potential Union challenges, should be sustained. The Petitioner's position is contrary to existing Board procedure and law and the adoption of its position would set a dangerous precedent, particularly in light of the Board's recently announced change in election procedures. 79 FR 74307 (December 15, 2014). The Petitioner's objection should be rejected and the Regional Director's decision sustained.

The Board has long held, and Petitioner admits, that it is the responsibility of the party seeking to challenge a voter to do so at the election. Balfre Gear & Manufacturing Company, 115 NLRB 19 (1956). The failure of the party to have an observer at the election does not shift that responsibility to the Board Agent conducting the election. Balfre, *supra*. The Board has allowed Board Agents to challenge voters but only where the Board Agent has actual knowledge of the voter's ineligibility. Solvent Services, Inc., 313 NLRB 645 (1994), H&L Distributing Company, 206 NLRB 169 (1973).

In the instant case the Board Agent had no knowledge of the ineligibility of the potential challenged voter. It was incumbent on the Union Business Agent, at the pre-election conference, to advise the Board Agent that Petitioner wanted a voter challenged and provide the Board Agent with knowledge of the voters' ineligibility (a reason why the employee was ineligible) so the Board Agent could challenge. The Union did neither. There is nothing in the Petitioner's submission indicating that, at the pre-election conference, the Union Business Agent ever raised the issue of a challenge with the Board Agent, much less provide any basis for a challenge.¹

The Petitioner seeks to place on the Board Agent the responsibility of inquiring about and determining whether a party desires to challenge voters and the reason for each challenge. Because the Board Agent did not affirmatively do this, Petitioner would set aside the election. Apart from the absence of any authority for such an imposition, this places a heavy burden on the Board Agent, particularly as s/he is engaged in setting up an election site, dealing with instructing the parties and observers concerning the mechanics of the election and determining that there is no supervisory presence that might jeopardize the election. This untoward burden should not be placed on the Board's Agents in any circumstances and particularly not in this case.

Although the Petitioner here raised the issue of challenges with the Board Agent nine days before the election, it did not, at that time, provide the name of any employee it sought to challenge or the reason for the challenge. Five days before the election, the Petitioner advised the Board Agent of the name of a voter the Union intended to challenge at the election, but again, it did not provide the Board Agent with the reason for the challenge. At the pre-election conference the issue was not raised. Despite the Petitioner's total abdication of its responsibility in this area, it now would like to shift its failure to the Board Agent. This should not be allowed. *NLRB Case Handling Manual for Representation Proceedings, Section 11338.2(b)*.

The Petitioner cites one case, Laubenstein and Portz, Inc., 226 NLRB 804 (1976), to advance its cause. The facts of that case are so different from those of the instant case that it cannot support Petitioner's argument. In Laubenstein, the parties had entered into a settlement agreement, approved by the Board, to settle certain unfair labor practice charges. In the settlement agreement the parties agreed to the details of an NLRB election and specifically agreed, with Board approval, that a particular employee would be included on the Excelsior list but would vote subject to challenge on the basis of alleged supervisory status. Id. at 805. At the pre-election conference the union advised the Board Agent conducting the election that it would not have an observer. The union further advised the Board Agent of the parties' settlement agreement to challenge the voter and the reason therefore. Id. at 805. Nevertheless, the Board Agent failed to challenge the voter. The Board upheld the union's objection to the election

¹ The undersigned, who was present at the entire pre-election conference, as counsel for the Employer, never heard the issue of challenges raised or discussed.

finding the Board Agent should have challenged the voter based on the settlement agreement which the Board Agent was aware of.

In the instant case there was no agreement by the parties arising out of an NLRB proceeding concerning challenges. Unlike Laubenstein, the Board Agent here was never asked by the Union to challenge a voter nor given any reason why a voter should be challenged. Clearly Laubenstein does not support the shifting of the responsibility to challenge from the Petitioner to the Board Agent. Indeed, Laubenstein appears to have been limited to its facts by a subsequent Board decision. Fern Laboratories Inc., 232 NLRB 379 (1977).

Sound policy based on recent Board developments also counsels rejection of the Union's argument. In light of the Board's new election rules, providing for even quicker elections, it seems clear that the ability of parties to resolve potential issues of voting eligibility may have to be put off until after elections have been held. Transferring the responsibility to challenge voters from the parties to Board Agents increases the possibility of many more objections to elections and numerous instances where a party claims it advised a Board Agent to challenge voters who were not challenged. As noted, it also places an added responsibility on Board Agents at a time they are already heavily engaged in preparing for an election.²

In sum, the Union's attempt to salvage an improper and untimely voter challenge, which the Regional Director properly rejected, by recasting it as an objection to the Board Agent's conduct of the election, should not be countenanced.

For all the reasons stated above, the Regional Directors Decision On Objection should be sustained and Petitioner's Exceptions should be denied.

Very truly yours,

JACKSON LEWIS P.C.



Steven S. Goodman

SSG:nml/lg

cc: David E. Leach, III, Regional Director
Paul L. Kleinbaum, Esq.
(Via Email – pkleinbaum@zazzali-law.com)

² Member Walther recognized this in his dissent in Laubenstein.



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November 20, 2014

VIA ELECTRONIC FILING

David E. Leach, III, Esq.
Regional Director
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

Re: Capstone Logistics LLC and IBT
Local 863
Case No. 22-RC-137642

Dear Regional Director Leach:

Please accept this letter as Capstone Logistics LLC's (hereinafter "Capstone" or the "Employer") position statement with respect to the objection filed by International Brotherhood of Teamsters, Local 863 (hereinafter "Local 863" or the "Union") to the conduct of the election in the above-captioned case. It is Capstone's position that the Union's objection is without merit, should be overruled and that the Regional Director should issue a Certification of Results.

FACTS

On September 26, 2014, the Union filed a petition (Case No. 22-RC-137642) with Region 22 of the National Labor Relations Board (hereinafter "NLRB" or the "Board") seeking an election among employees of the Employer working in a Sysco International (hereinafter "Sysco") warehouse in Jersey City, New Jersey. On October 20, 2014, the Regional Director approved a Stipulated Election Agreement entered into by the parties providing, inter alia, that an election be held on Friday, November 7, 2014 from 5:30 a.m. to 6:30 a.m. at the Sysco warehouse. The Agreement provided that each party was entitled to an equal number of observers "... to assist in the election, to challenge the eligibility of voters, and to verify the tally." (Emphasis added.)

On the morning of the election, prior to the start of the election, the Board agent, the Union business agent and the Employer's attorney, Steven Goodman, attended the pre-election conference in the conference room where the election was to take place. Mr. Goodman

will attest that the Union business agent did not raise any issue of voter eligibility, nor did he ask the Board agent to challenge any voter.

Prior to the start of the election, the Employer's observer came to the conference room and was instructed on the election procedures. No Union observer was present or identified. According to the Company's observer, no Union observer was present during the entire election period.

At the close of the election, the parties went into the conference room to observe the tally of ballots. Again, there was no discussion between the parties concerning challenging voters, other than Mr. Goodman asking the Board agent whether any votes had been challenged. The Board agent answered "NO." Thereafter, the Board agent counted the ballots and the Board agent, Union business agent and Mr. Goodman signed the Tally Of Ballots. The vote was six (6) for and six (6) opposed to representation. The Union did not receive a majority of the ballots cast. At no point was there any discussion of ballots that had been or should have been challenged.

Following the election, the Union filed an objection alleging the Board agent's conduct affected the outcome of the election. In support of its objection, the Union claims the Board agent failed to challenge an employee whose name was on the voter eligibility list despite being informed by the Union prior to the election that it intended to challenge the employee's vote. The Union also contends the Board agent was remiss in not asking the Union representative the basis for the challenge.

The Union's objection has no merit because it is untrue. Mr. Goodman was present for the entire pre-election conference and never heard *any* discussion of Union challenges or other voter eligibility issues. Moreover, the Union's challenge is contrary to long-standing Board law. Thus, the Union's Objection fails both as a matter of fact and as a matter of law. For these reasons, the Union's objection should be overruled and the Certification of Results issued.

DISCUSSION

The Board has long held that it is incumbent upon a party to an election to challenge voters at the time of the election through its own observers. Balfre Gear & Manufacturing Company, 115 NLRB 19 (1956). (Emphasis added.) The Board will not entertain post-election challenges absent circumstances not present in the instant case. NLRB v. A.J. Tower Co., 329 U.S. 324 (1946). The fact that a party to an election fails to provide an observer does not shift the responsibility of challenging voters to the Board agent. Balfre, *supra*. In Balfre, the union did not have an observer at the election. The union business agent drew up a list of voters whose eligibility to vote it questioned and gave the list to the Board agent asking him to challenge the voters. The Board agent refused, and the union filed an objection concerning the Board agent's refusal to challenge the voters. The Board overruled the objection stating it was not the Board agent's responsibility to challenge voters, and the Board agent could only challenge voters when in possession of actual knowledge that the employee is ineligible to vote. Balfre, *supra* p. 22. The Board has consistently reaffirmed this position, Galli Produce Co., Inc., 269 NLRB 478 (1984), most recently in Solvent Services, Inc., 313 NLRB 645 (1994).

In Solvent Services, Inc., the Board reaffirmed that the primary duty to challenge voters lies with the parties and the Board agent need challenge "... only where the agent has actual knowledge of the voter's ineligibility." Citing NLRB v. Paper Art Co., 430 F.2d 82, 84 (7th Cir. 1970). Further, the Board held that knowing that a dispute existed between the parties concerning eligibility to vote was not sufficient knowledge to require the Board agent to challenge a voter whose name appeared on the voter eligibility list. Solvent Services at p. 646.

In the present case the Board agent was not required to challenge the voter in question. The employee's name was on the voter eligibility list. At best, the Board agent may have known that a dispute existed between the parties concerning the employee's eligibility to vote. The Union does not and cannot establish that the Board agent possessed necessary information to meet the Board's standard required for him to challenge the voter. Nor is there any requirement that the Board agent ask the Union about the basis for its challenge. Rather, it is incumbent on the Union to challenge the voter and provide sufficient information necessary for the agent to challenge. It did not do this and cannot rely upon the objections procedure to rectify its lack of diligence.

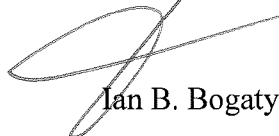
Moreover, the Union cannot claim it was unable to have an observer present. The election took place in the Sysco warehouse. The Sysco warehouse employees are represented by the same Union, Local 863. The Board has long held that non-employees of the employer involved in an election can serve as observers. Embassy Suites Hotel, 313 NLRB 302 (1993); San Francisco Bakery Employers Assn., 121 NLRB 1204 (1958). The Union could have easily used one of the Sysco employees to serve as an observer. Sysco had cooperated with the parties in scheduling the election, allowing Capstone to post election notices in the warehouse as well as allow use of the Sysco conference room to hold the election. Several Sysco shop stewards were gathered near the polling area during the course of the election. There is every reason to believe Sysco would have allowed one of its employees to serve as the Union observer if the Union asked. The Union never asked. The Union could have had an observer present to challenge the voter in question. The fact that it did not falls squarely on the Union.

CONCLUSION

Based on Board law and the facts of this case, the Union's objection is meritless. It was the Union's burden to insure that the voter was challenged. The Union's failure to do so fatally flaws the Union's objection because the Board agent was not required to assume the Union's responsibilities in this regard. Since post-election challenges are precluded, the Union's objection must be overruled and a Certification of Results issued.

Very truly yours,

JACKSON LEWIS P.C.



Ian B. Bogaty

IBB/nml

cc: Nancy Geraghty (Via Email – nancy.geraghty@capstonelogistics.com)
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